CLERK'S COPY.

No. 163

537028

TRANSCRIPT OF RECORD

Ct. of A. D. C.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MARCH 30, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Western District of Washington...	1	1
Indictment	1	1
Arraignment and plea	6	3
Withdrawal and consent to substitution of counsel	7	4
Hearing on demurrer	8	4
Amended demurrer	9	5
Plea in abatement	14	8
Memorandum opinion on plea in abatement and demurrer	18	9
Order denying plea in abatement and overruling demurrer	30	18
Supplement to memorandum opinion	31	19
Verdict	32	19
Proposed instructions of defendant	34	20
Motion for new trial	38	22
Sentence pronounced	39	23
Judgment and sentence	41	24
Notice of appeal and grounds of appeal	43	25
Order as to service of sentence	48	28
Affidavit in forma pauperis	50	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 19, 1943.

—5734

	Original	Print
Record from D. C. U. S., Western District of Washington—Continued		
Order dispensing with payment of fees and costs of printing record on appeal	53	30
Bill of exceptions	54	31
Testimony of Shunto Hirabayashi	54	31
Tom G. Rathbone	55	32
H. H. McKee	55	32
Floyd Schmoe	56	33
Captain Michael Revisto	56	33
Arthur G. Barnett	56	33
Motion for directed verdict and denial thereof	57	34
Testimony of Gordon Kiyoshi Hirabayashi	57	34
M. D. Woodbury	58	25
Motion for directed veredict and denial thereof	59	35
Judge's certificate to bill of exceptions	61	36
Assignment of errors	63	37
Praecipe for record on appeal	65	38
Clerk's certificate (omitted in printing)	67	
Proceedings in U. S. C. C. A., Ninth Circuit	69	40
Appellant's Statement of points	69	40
Order of Supreme Court directing that entire record be certified	92	43

[fols. 1-2]

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

May Term, 1942

No. 45738

UNITED STATES OF AMERICA, Plaintiff,

v.

GORDON KIYOSHI HIRABAYASHI, Defendant

INDICTMENT—Filed May 28, 1942

Bio. Pub. Law #503, Curfew Act; Viol. Civilian Exclusion Order No. 57

UNITED STATES OF AMERICA,
Western District of Washington,
Northern Division, ss:

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

Count I

That Gordon Kiyoshi Hirabayashi, being a person of Japanese anscestry, whose true and full name is to the Grand Jury unknown, on or about the 11th day of May, 1942, and continuing until the date of the return of this indictment, at the City of Seattle, Northern Division of the Western District of Washington, and within the jurisdiction of this Court then and there residing and being within the [fol. 3] geographical limits of Military Area No. 1, as such area is defined and described in Public Proclamations Nos. 1 and 2, issued by J. L. DeWitt as Lieutenant General of the United States Army and as the Military Commander of the Western Defense Command, Fourth Army, and so designated by the Secretary of War, pursuant to the Executive Order below described, did then and there commit an act in said military area contrary to the military orders applicable to said military area, to-wit: contrary to the restrictions of Civilian Exclusion Order No. 57, dated

May 10, 1942, issued by the said Military Commander pursuant to Executive Order No. 9066, issued by the President of the United States on February 19, 1942, in that during all of the times above mentioned the said Gordon Kiyoshi Hirabayashi, being an individual living alone within the area prescribed by said Civilian Exclusion Order No. 57, he, the said Gordon Kiyoshi Hirabayashi, did then and there fail and neglect to report to the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington, on Monday, May 11, 1942, between the hours of 8:00 o'clock A. M. and 5:00 o'clock P. M., or at all, and did fail to report to said Civil Control Station on May 12, 1942, between the hours of 8:00 o'clock A. M. and 5:00 o'clock P. M., or at all, contrary to directions of said Civilian Exclusion Order No. 57, when the said Gordon Kiyoshi Hirabayashi knew and should have known [fol. 4] of the existence and extent of the said orders and order and that the said acts above set forth were in violation of said orders; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count II

That on or about May 4, 1942, Gordon Kiyoshi Hirabayashi, being a person of Japanese ancestry, and then and there residing and being within the geographical limits of Military Area No. 1, as such area is defined and described in Public Proclamation No. 1, duly issued by J. L. DeWitt, Lieutenant General of the United States Army and designated as Military Commander of the Western Defense Command, Fourth Army, by the Secretary of War, pursuant to the Executive Order below described, did then and there commit an act within said military area and contrary to the restrictions applicable within said Military Area No. 1, which act was contrary to the restrictions of Public Proclamation No. 3, issued March 24, 1942, by the aforesaid Military Commander, pursuant to Executive Order No. 9066, issued by the President of the United States on February 19, 1942, in that the said Gordon Kiyoshi Hirabayashi failed to obey paragraph No. 1 of said Public Proclamation No. 3, which provides as follows:

"1. From and after 6:00 o'clock A. M., March 27, 1942, [fol. 5] * * * all persons of Japanese ancestry resid-

ing or being within the geographical limits of Military Area Number 1 * * * shall be within their place of residence between the hours of 8:00 o'clock P. M. and 6:00 o'clock A. M,. which period is hereinafter referred to as the hours of curfew,"

in that the said Gordon Kiyoshi Hirabayashi was not within his place of residence at Seattle, Washington, between the hours of 8:00 o'clock P. M. and 6:00 o'clock A. M. on or about May 4, 1942, when he, the said Gordon Kiyoshi Hirabayashi, knew or should have known of the existence and extent of said restrictions and order and that his act was in violation thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

S/n. J. Charles Dennis, United States Attorney;
Allan Pomeroy, Asst. United States Attorney.

Endorsed: United States of America vs. Gordon Kiyoshi Hirabayashi.

Indictment

Vio. Pub. Law #503, Curfew Act;
Vio. Civilian Exclusion Order No. 57 a true bill,
Wendell P. Hurlbet, Foreman. J. Charles Dennis.

Presented to the Court by the Foreman of the Grand Jury in open court, in the Presence of the Grand Jury, and Filed in the U. S. District Court, May 28, 1942.
Judson W. Shorett, Clerk. By Lee L. Bruff, Deputy.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ARRAIGNMENT AND PLEA—June 1, 1942

Now on this 1st day of June, 1942, this cause comes on before the Court for arraignment and plea. Gerald D. Hile, Asst. U. S. Attorney appears for the Government. Attorney John Geisness appears for the defendant. The defendant is in court in custody of the U. S. Marshall and states that true names is Gordon Kiyoshi Hirabayashi. The defendant waives reading of the indictment and enters

a plea of not guilty to each and both counts as charged in the indictment. The defendant given the privilege to interpose motion or demurrer to the indictment within the next ten days, said motion or demurrer must be served and filed within that time.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

WITHDRAWAL AND CONSENT TO SUBSTITUTION OF ATTORNEY—Filed June 11, 1942

Comes now John Geisness, attorney for the defendant in the above entitled cause, withdraws as attorney for said defendant and consents to the substitution of Frank L. Walters as attorney in his place and stead.

Dated this 11th day of June, 1942.

s/n John Geisness, Attorney for Dft.

Received a copy of the within withdrawal this 11th day of June, 1942.

J. Charles Dennis, Att. for Pltf.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

HEARING ON DEMURRER—June 22, 1942

Now on this 22nd day of June, 1942, this cause comes on before the court for hearing on demurrer and defendants motion for permission to plead by motion to the indictment. G. D. Hile, Asst. U. S. Attorney appears for the Government and Attorney Frank Walters appears for the defendant. This cause is called. Defendant is in court in custody of the U. S. Marshal. Counsel for defense asks permission of the court to serve and file a motion to make the indictment more definite in certain particulars and also leave to file an amended demurrer, that the Government advised the court it has no objection to the granting of such motions

and it has been argued by counsel that leave to the defendant to file within one week from today is reasonable and that argument thereon might be had three weeks from today. Leave is granted to the defendant to serve and file within one week from today motion as mentioned in the motion now on file and also leave to serve and file within one week from today an amended demurrer pursuant to the oral application of defense counsel.

[fols. 9-10] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED DEMURRER—Filed June 29, 1942

Comes now Gordon Kiyoshi Hirabayashi, defendant above named and demurs to the indictment herein upon the following grounds as to Count I:

1

That said Count I of the Indictment fails to state facts sufficient to constitute a crime.

2

That Public Law No. 503, 77th Congress, approved March 21, 1942 under and pursuant to which this action is brought is too indefinite and too uncertain to be a valid criminal statute, and said Public Law No. 503 os unconstitutional and void in that it fails to define any crime or any course of conduct the violation of which will constitute a crime, and said Public law fails to defeine with reasonable precision what act or acts it intends to prohibit.

3

That Civilian Exclusion Order No. 57, dated May 10, 1942, is unconstitutional and void for the reason that J. L. De Witt, Lieutenant General of the United States Army, the Military Commander who issued said Order was with-
[fol. 11] out any power of authority to add or create any class of persons subject to the provisions thereof and designated as "persons of Japanese ancestry".

4

That said Order of the Military Commander above referred to is further unconstitutional and void for the reason that, if carried into effect said order would deprive this defendant of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

5

That said Order of the Military Commander above referred to is unconstitutional and void for the reason that, if carried into effect, it would deprive this defendant, an American citizen, of the privileges and immunities to which the citizens of the several states are entitled, in violation of and contrary to the provisions of Article IV, Section 2, Clause 1 of the Constitution of the United States of America.

6

That said Order of the Military Commander herein above referred to was and is unauthorized and void for the reason that it was not authorized by the Executive Order No. 9066 referred to in County I of the indictment, nor by any other order of the President of the United States.

7

That said Order of the Military Commander hereinabove referred to is and was unauthorized and void for the reason that said Executive Order No. 9066 referred to in Count I is unconstitutional and void insofar as it attempts to include in the class of persons who may be excluded any other persons than the alien enemies defined in section 21, Title [fol. 12] 50 of the United States Code pursuant to which said Executive Order was issued.

8

That said Public Law No. 503 and said Executive Order and the Public Proclamations and Military Orders hereinabove and in Count I referred to, are unconstitutional and void for the reasons that they violate the rights of this defendant to be free from unreasonable seizures of his person under the Fourth Amendment to the Constitution of the United States of America.

9

That said Public Law No. 503 above referred to is unconstitutional and void for the reason that it fails to set up any standards for the regulations which the Military commanders were permitted to promulgate and is therefore an unconstitutional delegation of the powers of the legislature.

10

That said Public Law No. 503 and the proclamations and military orders issued pursuant thereto are unconstitutional and void for the reason that they are arbitrary and capricious and fail to show or set up any sufficient or reasonable basis for the classification of persons subject thereto.

The defendant further demurs as to Count II of the indictment herein upon the following grounds:

1

That said Count II fails to state facts sufficient to constitute a crime.

[fol. 13] 2

That Public Proclamation No. 3, issued March 24, 1942 by the Military Commander referred to in said Count II, and particularly that portion thereof quoted in said Count II is unconstitutional and void for the reason that, if carried into effect, said order will deprive this defendant of his liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

3

That said order of the Military Commander, or Proclamation No. 3 above referred to is unconstitutional and void for the reason that, if it is carried into effect it will deprive this defendant, an American citizen of the privileges and immunities to which citizens of the several states are entitled, contrary to Article IV, section 2, clause 1 of the Constitution of the United States of America.

4

That said Public Proclamation No. 3 above referred to is unconstitutional and void for the reason that it is not au-

thorized by said Executive Order No. 9066 referred to in County II, nor by any other order of the President of the United States of America.

5

That said Public Proclamation No. 3 referred to in Count II is and was unauthorized and void for the reason that if is no- authorized by any valid legislative act of law of the Congress of the United States of America.

Received a copy of this within Amended Demurrer this 29th day of June, 1942. J. Charles Dennis, Atty for Pltf., Frank L. Walters, Attorney for the Defendant.

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA IN ABATEMENT—Filed June 29, 1942

And now comes, Gordon Kiyoshi Hirabayashi, defendant above named, in his own person and by Frank L. Walters, his attorney of record, and for his Plea in abatement of the indictment herein alleges:

1

That he, the defendant, was born on the 23rd day of April, 1918, in the County of King, State of Washington of said United States of America, and the said State of Washington, and that he has always borne and does now bear, true, full and complete faith and allegiance to the United States of America and the government thereof. That he is 24 years of age.

2

That he, said defendant, has never been and is not now, a native, citizen, denizen or subject of the Empire of Japan, and has never borne and does not now bear any faith or allegiance to the said Empire of Japan, or to the emperor or the government thereof.

3

That the full, true and correct name of this defendant is Gordon Kiyoshi Hirabayashi.

[fol. 15]

4

That the purported indictment herein, pursuant to and under which this defendant was arrested and incarcerated, is insufficient to constitute a valid indictment against this defendant in that said indictment fails to allege any citizenship status of this defendant and is therefor unlawful and void.

Where fore, said Gordon Kiyoshi Hirabayashi, defendant, prays for judgment herein of the said indictment that the same be quashed and dismissed, and further that whether the United States of America ought or can prosecute defendant for the premises that he may be discharged thereof without delay.

s/n Frank L. Walters, Attorney for the Defendant.

Duly sworn to by Gordon Kiyoshi Hirabayashi. Jurat omitted in printing.

[fols. 16-17] Endorsed: Received a copy of the within Plea in Abatement this 29th day of June 1942. L. Charles Dennis, Attorney for Pltf.

[File endorsement omitted.]

[fol. 18] In United States District Court, May Term, 1942

No. 45738

United States of America, Plaintiff,

vs.

Gordon Kiyoshi Hirabayashi, Defendant

Memorandum Opinion—Filed Sept. 15, 1942

The indictment involved in this action in Count I charges the defendant, a person of Japanese ancestry residing at Seattle in Military Area No. 1, with violating Civilian Exclusion Order No. 57 by failing to report to the Civilian

Control Station, and in Count II charges said defendant with violating the curfew provision of Public Proclamation No. 3 issued by the Military Commander of the Western Defense Command.

The defendant, after filing an original demurrer, later, pursuant to court permission, interposed an amended demurrer to each such count of the indictment upon the grounds that the orders and proclamations involved are unconstitutional by virtue of being in violation of the Fifth Amendment and of Article 4, Section 2, Clause 1 of the Constitution of the United States, and also are not authorized by Executive Order of the President or by any valid legislative act or law of Congress.

The defendant at the time of filing such amended demurrer, without any permission, filed a plea in abatement alleging that the defendant is a natural born citizen of this country, aged twenty-four, bearing true faith and allegiance to the United States and none to Japan.

The defendant two weeks prior to the filing of said plea in abatement asked for and was granted permission to file a [fol. 19] motion to make the indictment more definite and certain. No such motion was ever filed nor has the defendant at any time even to this date requested permission to interpose such or any plea in abatement.

The government has moved to strike such plea and has also demurred to same. The matter was presented to the court after oral argument supplementing very extensive briefs which in the aggregate cited about one hundred thirty court decisions and several texts. It is obvious that no analysis of such a mass of citations can be here indulged in without most tediously extending this opinion.

In substance and effect the defendant's position is that regardless of how critical the war perils, of how necessary and vital the military area, and of how essential to American success in this conflict the curfew provisions and evacuation orders applicable to those of Japanese ancestry in such military area, may be that the armed forces of this country and our government are absolutely helpless to make or enforce any such curfew provisions or exclusion orders until a Constitutional amendment has been proposed, voted by both houses of Congress, and finally adopted by three-fourths of the states.

It must not for an instant be forgotten that since Pearl Harbor last December we have been engaged in a total war

with enemies unbelievably treacherous and wholly ruthless, who intend to totally destroy this nation, its Constitution, our way of life, and trample all liberty and freedom everywhere from this earth. It must be realized that civilization itself is at stake in this global conflict.

[fol. 20] After grave and careful consideration of the arguments and authorities presented and of the extremely important phases of this question I am satisfied that Executive Order 9066, Public Law 503, the curfew regulation and Exclusion Order 57 are constitutional and valid, that the indictment is sufficient and that the attack the defendant has made against it must fail.

The attempted plea in abatement should be stricken. It was tardily interposed without permission. To permit it to stand would be a mistake by virtue of the precedent. However, the striking of it will not at all decrease or affect any rights of defendant.

The indictment in merely charging the defendant with being of Japanese ancestry permits the implication that he was born in the United States and is therefore a citizen. At the trial, defendant will, of course, be permitted to introduce evidence to such effect if he so desires.

At the close of the oral argument counsel were advised that my views as expressed in *Ex parte, Ventura, et al,* 44 F. Supp. 520, were quite at variance with the defense arguments in this case and that unless I came to the conclusion that I was then mistaken that of necessity my decision would be adverse to defendant's contentions now before me. It suffices to say that I am still of the opinion that my views as contained in that decision are correct.

It was recently stated in State of *California v. Anglim,* 129 F. 2d (CCA 9th) 455:

[fol. 21] "• • • The same act at one time may be regarded as constitutional by facts judicially noted or other facts then shown, and at another time, on other known or proved facts, be held unconstitutional. It was so held in an opinion by Mr. Justice Holmes in Chastleton Corp. v. Sinclair, 264 U. S. 543, 548, 549, 44 S. CT. 405, 67 L. Ed. 841, in determining the constitutionality of the rent regulating law for the District of Columbia."

And so the decision of this case must be in the light of the unprecedented world conflict which so suddenly engulfed this nation, in the light of this being a declared Military

Area, in the light of the dangers that would confront us if defendant should prevail, in the light of the advantage to this nation and actually to those of Japanese ancestry from the orders and proclamations which defendant attacks.

This Pacific Coast has been shelled at Santa Barbara, Seaside, Vancouver Island, ships have been submarined without warning in sight of shore, sinking has occurred near the entrance to the straits that lead to Puget Sound, Dutch Harbor has been bombed, and a formidable force of Japanese soldiers occupies Kiska Island. Who can guarantee that they who have already invaded the western Aleutians have not since Pearl Harbor been perfecting plans to attack by carrier planes and suicide parachutists the vital Seattle bomber factories, our docks so essential to Alaska's life, the navy yard at Bremerton just across the bay?

The commander in Chief of our Army and our Navy, the President, in exercise of the war authorities granted him by the Constitution and by certain legislation, on February 19, 1942 issued Executive Order 9066. Said Executive Order provides that the Secretary of War and Military Commanders designated by him were authorized and directed, whenever, they deemed such action necessary

[fol. 22] "• • • to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion • • •"

On February 20, 1942 the Secretary of War designated Lieutenant General DeWitt to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command, which includes Alaska, Washington, Oregon, California and five other states.

On March 2, 1942 in said Public Proclamation No. 1 General DeWitt declared that the entire Pacific Coast was by its geographical location

"• • • particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith,

is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations?''

On March 21, 1942 Public Law No. 503 enacted by Congress became effective. It reads, in part:

"• • • whoever shall • • • leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor • • •''

In Public Proclamation No. 3, issued March 24, 1942 as aforesaid, it is stated that

[fol. 23] The present situation within these Military Areas (including Military Area No. 1) and Zones requites as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof.''

Civilian Exclusion Order No. 57, issued May 10, 1942, provided that after Saturday noon, May 16, 1942 "all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1'' consisting of that portion of Seattle in which the indictment alleged defendant resided, and further required that persons of Japanese ancestry personally or by representative as therein specified should report to the therein specified Civil Control Station on May 11 or May 12, 1942. Such Civilian Exclusion Order No. 57 then gave instructions relative to the regulations for evacuation to the Assemly Center.

In the very recent opinion under date of July 29, 1942 of the United States District Judge F. Ryan Duffy in the Lincoln Seiichi Kanai habeas corpus proceeding before him, in which such petitioner, an American citizen of Japanese ancestry, challenged the constitutionality of said

Presidential Order No. 9066 and attacked the validity of the same Military Area No. 1 herein involved, the court said:

"• • • This court will not constitute itself as a board of strategy, and declare what is a necessary or proper military area.

"• • • The field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. • • • The theater of war is no longer limited to any definite geographical area. Saboteurs have already landed on our coasts. This court can [fol. 24] take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast.

"Rights of the individual, under our federal Constitution and its amendments, are not absolute. When such rights come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. • • • *In re Schroeder Hotel Co.* (CCA, 7th), 86 F. (2d) 491; *Hitchman Coal & Coke Co. v. Mitchell, et al,* 245 U. S. 229.

"That there is nothing about the executive order, or the designation of the military area, which is unconstitutional, is very certain, considering the necessities and the exigencies of war which has already struck upon our Pacific coast."

The curfew provision and Civilian Exclusion Order No. 57 here involved are very definite and understandable. There is no good reason why defendant should not easily have comprehended what they required of him. It clearly appears that they are not only reasonable but vitally necessary.

The value to this country of such war measures seems most apparent. On even casual analysis their advantage to all those American citizens of Japanese ancestry who are loyal to this country also quickly appears.

Of vital importance in considering this question is the fact that the parachutists and saboteurs, as well as the soldiers, of Japan make diabolically clever use of infiltration tactics. They are shrewd masters of tricky conceal-

ment among any who resemble them. With the aid of any artifice or treachery they seek such human camo-flouge and with uncanny skill discover and take advantage of any disloyalty among their kind.

[fol. 25] The preamble to our Federal Constitution says:

"We, the people of the United States, in order to * * * provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

The President as Commander in Chief, and the Military Commander in this Area have determined that the curfew, reporting and evacuation provisions applicable to persons of Japanese ancestry in certain vital military areas, are essential. It may well be assumed that Congress enacted Public Law No. 503 to authorize such determination "in order to * * * provide for the common defense * * * and secure the blessings of liberty to ourselves and our posterity."

While emergency cannot create power it can call into play a power already existing but only exercised in times of emergency. *Wilson* v. *New, et al.*, 243 U. S. 332, 348; *Home building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425-6. War powers are to be construed broadly. See *Hamilton* v. *Kentucky Distilleries Co.* 251 U. S. 146. It has been well said that "the power to wage war is the power to wage war successfully."

The defendant may most properly be deemed by the President, military forces and Congress as residing in a portion of a vital military fortress and factory arsenal. (Ex parte Ventura-supra).

In view of the war emergency the President and the Commander of this defense command, as authorized by Congress in said Public Law 503, may determine whether persons of Japanese ancestry shall observe curfew in a military area and whether they shall be removed therefrom.

The contentions that the Fourth, Fifth and Sixth Amendments or Article 4, Section 2, Clause 1 of the Constitution defeat the indictment has not been overlooked. Defendant has submitted his technical interpretations of such provisions.

[fol. 26] As has already been pointed out, certainly in time of war a technical right of an individual should not

be permitted to endanger all of the constitutional rights of the whole citizenry.

Article 4, Section 2, Clause 1 reads as follows:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Obviously such provision is not applicable to this case in these times under the circumstances now existing. The powers challenged by this defendant are being exercised not by any state but by the Federal Government.

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In my opinion the indictment against defendant is not affected by such amendment.

The defendant, recognizing that the Fourteenth Amendment applies only to action by the states, has resorted to the Fifth Amendment. "But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401.

Defendant in such connection contends that the curfew regulations and exclusion order applicable to him are discriminatory. Such contention must be considered in the [fol. 27] light of the war emergency. The validity of conscription which applies only to certain ages of one sex and excepts certain classes of persons from military service has been judicially determined as not invalid on the ground of being discriminatory; moreover, the Social Security Act has successfully hurdled the objection that it was in violation of the Fifth Amendment in that it was discriminatory because it did not apply to certain employers or certain occupations. *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

With respect to the application of the Fifth and Sixth Amendments in time of war Charles E. Hughes, in 1917, discussing "War Powers Under the Constitution", 42 American Bar Association Reports, 237, 243, stated:

"Clearly, these amendments, normally and perfectly adapted to conditions of peace, do not have the same complete and universal application in time of war."

Certainly a reading of the Sixth Amendment does not disclose any sufficient basis therein during the present emergency to defeat the indictment.

The holding of *Ex parte Milligan*, 4 Wall, 2, 18, U. S. 27, is not applicable here. This prosecution is being maintained in this court of law—in that case the defendant was tried before a military commission although the courts were then open and functioning. There are many other differences, as a reading of such will disclose, some of which are mentioned in *Ex parte Ventura*, et al., supra.

Dimouts, blackouts, air raid sirens, barrage balloons, are some of the many unprecedented precautionary measures deemed by the military to be necessary in this area. No [fol. 28] one can reasonably question the wisdom of such measures. And this court will not question in this time of war the wisdom or necessity of the curfew or evacuation orders with respect to those of Japanese ancestry which are involved in this proceeding. The situation is too grave — the menace too great. Nor can defendant substitute his judgment for the judgment of the Commander in Chief and the general acting under the President's direction, pursuant to constitutional powers and the Congressional ratification and authority of Public Law 503.

The Constitution of the United States was intended by the fathers who framed it to be able to cope with war emergencies. This nation came into being as a result of a successful war. The Constitution was written shortly thereafter and at a time when its framers had every reason, by virtue of their experience and in the light of then world conditions, to expect this nation would be confronted by wars in future.

In *Home Building & Loan Association* v. *Blaisdell*, supra, in the court's opinion by Chief Justice Hughes, at page 426 it is said:

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. * * * The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to

preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. *When the provisions* of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, * * * But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."

[fol. 29] Unquestionably, the constitutional grants and limitations of power applicable to the question here involved are set forth in general clauses. Therefore, our Constitution does permit Congress and our President as Commander in Chief in time of war, to make and enforce necessary regulations to protect critical military areas desperately essential for national defense. In these days of lightning war this country does not have to submit to destruction while it awaits the slow process of Constitutional Amendment.

There must, of course, be extraordinary reasons to justify curfew for or any removal, even from a military area, of American citizens residing therein. But with respect to those of Japanese ancestry in Military Area No. 1 certainly since Pearl Harbor most extraordinary reasons have been obtained.

Written orders in harmony with this decision striking defendant's plea in abatement and overruling defendant's amended demurrer to each count of the indictment is requested.

Dated September 15th, 1942.

s/n Lloyd L. Black, United States District Judge

[File endorsement omitted.]

[fol. 30] In United States District Court

[Title omitted]

Order Denying Plea In Abatement and Overruling Demurrer—Filed Sept. 24, 1942

In the above entitled cause, it is hereby Ordered

(1) The plea in abatement filed by defendant is hereby denied. (Defendant excepts, exception allowed.)

(2) The defendant's amended demurrer is hereby overruled. (defendant excepts, exception allowed).

Done in open Court this 24th day of September, A. D. 1942.

s/n Lloyd L. Black, United States District Judge.

Presented by: J. Charles Dennis, United States Attorney.
Approved as to form: Frank L. Walters, Attorney for Defendant.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENT TO MEMORANDUM OPINION DATED SEPTEMBER 15, 1942—Filed Oct. 17, 1942

Immediately following the first paragraph on the first page of the memorandum opinion herein dated Stepember 15, 1942, the following paragraph shall be inserted, to-wit:

"Upon arraignment the defendant pleaded not guilty to each count and was given the privilege of interposing motion or demurrer to the indictment within ten days."

Dated October 17, 1942.

s/n Lloyd L. Black, United States District Judge.

[File endorsement omitted.]

[fol. 32-33] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed Oct. 20, 1942

We, the jury in the above-entitled cause, find the defendant, Gordon Kiyoshi Hirabayashi is guilty as charged in Count I of the Indictment filed herein; is guilty as charged in Count II of the Indictment filed herein.

s/n Robert M. Bardue, Foreman.

Dated: October 20, 1942.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

PROPOSED INSTRUCTIONS OF DEFENDANT—Filed October 20, 1942

Instruction No. —

You are instructed that Executive Order No. 9066 and Civilian Exclusion Order No. 57 and Public Proclamation No. 3 of the Military Commander were issued for the purpose of protecting our national defense materials, national defense premises, and national defense utilities against acts of espionage or sabotage.

You are further instructed that before any person could or can be excluded from any military area prescribed by the Military Commander or interned or compelled to obey any curfew regulations prescribed by a military commander, such person must first have been charged with engaging in or committing acts of espionage or sabotage of our national defense materials, premises or utilities; that he must have been given a hearing on such charges before an impartial tribunal where he could defend himself against the charges, have legal counsel to assist him and could produce witnesses on his own behalf; that after such hearing he must have been found guilty of the charge or charges against him; and that without such a hearing on such charges and his conviction thereof he would be under no duty to report to the Civil Control Station described in County I of the indictment, nor to obey the curfew regulations described in Count II of the indictment.

Therefore, unless you find from the evidence at this trial that the defendant here was so charged with engaging in espionage or sabotage or our nation defense materials, premises or utilities and after a hearing on such charges was convicted thereof, you can not find the defendant guilty under either count of the indictment.

[fol. 35] Instruction No. —

You are instructed that under a statute enacted by the Congress of the United States, alien enemies are defined as the "natives, citizens, denizens or subjects of the hostile nation or government" which has been declared by the President to be at war with the United States.

You are further instructed that the law presumes that such an alien enemy as above defined will commit acts of

espionage or sabotage against the United States, and on the basis of such presumption such an alien enemy can be temporarily restricted in his liberty of movement, or can be temporarily excluded from a military area, or can be temporarily compelled to obey curfew or other regulations relative to his movements and conduct; but that before such restriction of liberty, exclusion from a military area or obedience to such regulations could be made permanent, such alien enemy would first have to be charged with the commission of some act or acts of espionage or sabotage against the United States and have been granted a hearing before an impartial tribunal where he could defend himself against such charges, and must have been found guilty of the act or acts charged.

But you are further instructed that as to citizens of the United States of America no such presumption as above described exists either in law or in fact, and that before any citizen of the United States of American can be temporarily or permanently excluded from a military area or compelled to obey curfew or other regulation or have his liberty of movement restricted, he must first have been [fol. 36] charged with some act or acts of espionage or sabotage against the United States, have been granted a hearing on such charges before an impartial tribunal, and have been found guilty of the acts charged.

You are further instructed that the above protection accorded a United States citizen is guaranteed to him by the Constitution of the United States of America, and no discrimination can be made against him in that protection because of his race or color.

You are further instructed that the evidence at this trial proves in this case that the defendant here is a native born citizen of the United States of America, of Japanese ancestry, and that as such he is entitled to the above described constitutional protection regardless of his race, color or ancestry.

Therefore, unless you further find from the evidence here that the defendant was charged with an act or acts of espionage or sabotage against the United States, was granted a hearing on such charges where he was permitted to defend himself, and was found guilty of the act or acts charged, then I instruct you that the defendant owed no duty to obey Civilian Exclusion Order No. 57, nor Proclamation No. 3 of the Military Commander, and you

must find the defendant not guilty under either count of the indictment.

Instruction No. —

You are instructed that the Congress of the United States of America alone has the power to declare martial law in or over any portion of the United States, and that this power can not be delegated to the President or the Secretary of War or to any military commander designated by him. [fol. 37] You are further instructed that the existence of a state of war between the United States and a foreign country does not suspend the rights guaranteed by the Constitution that no person can be deprived of his life, liberty or property without due process of law. Such due process of law includes the right of a person to have a public hearing after he has been informed of the nature and cause of the accusation against him and his right to defend against such accusation, have counsel to assist in his defense, and to compel witnesses to testify on his behalf.

You are further instructed that unless you find from the evidence here that the defendant was accused of some unlawful act against the United States, was granted a hearing on such accusation where he was allowed to defend himself, and was found guilty of what he was accused, then I instruct you that the defendant was under no duty to obey Civilian Exclusion Order No. 57, nor Proclamation No. 3 of the Military Commander, and you must find the defendant not guilty.

[fol. 38] In United States District Court

[Title omitted]

Motion for New Trial

Comes now the defendant, by Frank L. Walters, his counsel herein, and moves the Court for a New Trial in the above entitled cause upon the following grounds:

1. That the verdict in and as to each Count of the indictment is against the weight of the evidence;

2. That the Court erred in its instructions as — the issues of fact to be determined by the Jury and as to the law of the case as to each count of the indictment;

3. That the Court erred in denying defendant's motion for a directed verdict of acquittal and dismissal of the action made at the close of the case by the plaintiff;

4. That the Court erred in denying defendant's motion for a directed verdict of acquittal and dismissal of the action made at the close of the whole case or trial;

5. That the defendant was not granted a fair and impartial trial on all of the issues in the action.

s/n Frank L. Walters, Attorney for the Defendant.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

SENTENCE PRONOUNCED—October 21, 1942

Now on this 21st day of October, 1942, J. Charles Dennis, United States Attorney appearing for the plaintiff, this cause comes on before the Court for imposition of sentence of the defendant Gordon Kiyoshi Hirabayashi, on the verdict of guilty as charge- in both counts of the indictment. The defendant is present and in the custody of the United States Marshal and accompanied by his counsel Frank L. Walters. The matter is called and at the request of counsel for the defendant, the same is continued until 2 p. m., today, at which time the parties are all present as before. The defendant files a motion for a new trial. The same is argued, denied and overruled and an exception thereto is allowed. Statements are made by counsel for each side. At this time, pursuant to the verdict of the jury and upon the verdict of the jury, the Court adjudges that the defendant is guilty of the Charge contained in Count I of the Indictment and upon the verdict of guilty by the jury, pursuant to such verdict, the Court adjudges the defendant guilty on the charges contained in Count II of the indictment. The defendant through his counsel moves for an arrest of judgment in this case and moves that the defendant be released from custody and moves for a dismissal of the action. The [fol. 40] *The* motions and each of them are denied and overruled, an exception thereto is allowed counsel for the defendant. Sentence is pronounced at this time. The defendant, through his counsel, except to the entry of the foregoing

sentence and judgment, and such exception is noted and allowed.

Later, this day, written Judgment and sentence is signed by the court in the presence of the defendant and his counsel, the terms of which are as orally pronounced by the court. The defendant is remanded into custody.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT AND SENTENCE—Filed Oct. 21, 1942

Comes now on this 21st day of October, 1942, the said defendant Gordon Kiyoshi Hirabayashi into open Court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, and the verdict of the jury finding defendant guilty on Counts I and II of the indictment, it is

Considered, ordered and adjudged by the Court that the said defendant Gordon Kiyoshi Hirabayashi is guilty as charged in Count I of the indictment and that on Count I he be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp, Dupont, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may be law designate, for the period of three (3) months.

[fol. 42] It is further considered, ordered and adjudged by the Court that the said defendant Gordon Kiyoshi Hirabayashi on Count II of the indictment, be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp, at Dupont, Washington, for the period of three (3) months; Provided, however, that the execution of the sentence on said Count II shall run concurrently with and not consecutively to the execution of the sentence imposed on Count I of the indictment.

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for de-

livery to the Superintendent of the Federal Prison Camp, Dupont, Washington, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of a commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in open court this 21st day of October, 1942.

s/n Lloyd L. Black, United States District Judge.

Presented by J. Charles Dennis, United States Attorney.

Violation of Public Law #503, Curfew Act; and Civilian Exclusion Order No. 57.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND GROUNDS OF APPEAL—Filed Oct. 23, 1942

Name and address of appellant: Gordon Kiyoshi Hirabayashi, 1417 E. 42nd St., Seattle, Wash.

Name and address of appellant's attorney: Frank L. Walters, 828 Central Building, Seattle, Washington.

Offense: Count I of indictment; a misdemeanor, to-wit: a violation of Public Law No. 503, Seventy-seventh Congress Chapter 191, Second Session, H. R. 6758, in that defendant-appellant as a person of Japanese ancestry on May 11, 1942 and May 12, 1942, knowingly remained in Military Area No. 1, as such area is defined by Public Proclamations Nos. 1 and 2, issued by J. L. De Witt as Lt. Gen., U. S. Army and as the Military Commander of the Western Defense Command Fourth Army, from which Military Area he was prescribed by Civilian Exclusion Order No. 57 issued by said Military Commander on May 10, 1942, and said defendant failed to report to the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington, on Monday, May 11, 1942 and on May 12, 1942, [fol. 44] said Public Proclamations Nos. 1 and 2, and said Civilian Exclusion Order No. 57 having been ostensibly authorized by Executive Order No. 9066 of the President of the United States of America dated February 19, 1942; and as to

Count II of the Indictment; a misdemeanor, to-wit: a violation of Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. No. 6758, in that defendant as a person of Japanese ancestry, but a native born American citizen, knowingly remained away from and was not within this place of residence at Seattle, Washington on May 4, 1942 between the hours of 8:00 o'clock P. M., and 6:00 o'clock A. M. of May 5, 1942, which period is referred to as the hours of curfew, contrary to the provisions of paragraph 1, of Public Proclamation No. 3, of said J. L. DeWitt, Lt. Gen. of the United States Army as the Military Commander of the Western Defense Command, Fourth Army, said residence of the defendant then being within Military Area No. 1, as such area is defined and described in Public Proclamation No. 1 and Public Proclamation No. 3 of the Military Commander having been authorized ostensibly by Executive Order No. 9066 of the President of the United States of America dated February 19, 1942.

Date of Judgment: October 21, 1942.

Brief description of judgment or sentence: the defendant was found guilty on both of above counts of the indictment by the above entitled Court of the offenses therein charged and was committed to the custody of the Attorney General of the United States for imprisonment in the Federal Prison Camp, Dupont, Washington, or in such other like institution as the Attorney General of the United [fol. 45] States or his authorized representative may by law designate, for a period of three (30) months, as to each count of the indictment, said sentences and terms to run concurrently with each other and not consecutively.

Name of prison where defendant is now confined, if not on bail: King County Jail, at Seattle, Washington, and is not now on bail.

I, Gordon Kiyoshi Hirabayashi, Defendant and Appellant, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order above mentioned on the grounds set forth below.

Dated: October 23, 1942

s/n Gordon Kiyoshi Hirabayashi, Appellant.

Grounds of Appeal

1. The trial court erred in overruling defendant's amended demurrer and denying defendant's plea in abatement to the indictment and in refusing to sustain said

amended demurrer to the indictment and grant said plea in abatement of the indictment, and refusing to dismiss the indictment and action and to discharge the defendant, to all of which the defendant duly and regularly excepted and his exception was allowed.

2. That the trial court erred in denying defendant's motion made during the trial and at the opening of the government's case in chief before any evidence was introduced, to dismiss the action and discharge the defendant on the grounds that the indictment failed to state facts sufficient to constitute any offense or offenses with which the indictment attempts to charge the defendant, to which ruling the defendant duly and regularly excepted and his exception was allowed.

[fol. 46] 3. That the trial court erred in denying defendant's motion to dismiss the indictment and to render a judgment finding defendant not guilty of either offense charged in the two counts of the indictment and ordering him discharged, made during the trial and at the close of the government's case in chief, to the denial of which motion the defendant duly and regularly excepted and his exception was allowed.

4. That the trial court erred in denying defendant's motion to dismiss the indictment and to render a judgment finding him not guilty of either offense charged in the two counts of the indictment and ordering him discharged which was made during the court of the trial and at the close of the defendant's case, to which denial the defendant duly and regularly excepted and his exception was allowed.

5. That the trial court erred in denying defendant's motion in arrest of judgment made at the conclusion of the trial and immediately after the trial court found and pronounced the defendant guilty of the offenses charged in the two counts of the indictment, to which denial the defendant duly and regularly excepted and his exception was allowed.

6. That the trial court erred in denying the defendant's motion for a new trial made before the trial court pronounced and entered the judgment and sentence appealed from, to which denial the defendant duly and regularly excepted and his exception was allowed.

7. That the evidence is and was insufficient as a matter of law to sustain the finding of the trial court that the defend-

ant was guilty of either of the offenses charged in the two counts of the indictment.

Dated: October 23, 1942.

s/n Frank L. Walters, Attorney for the Defendant-Appellant.

[fol. 47] Office and Post Office Address: 828 Central Building, Seattle, Washington.

Endorsed: Received a copy of the within Notice of Appeal this 23 day of Oct., 1942, J. Charles Dennis, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER AS TO SERVICE OF SENTENCE—Filed Oct. 26, 1942

The defendant above named having served and filed herein as required by law a Notice of Appeal to the United States Circuit Court of Appeal for the Ninth Circuit from the Judgment of guilty and sentence herein, and the defendant having elected to stay in the county jail of King County, Washington, or be admitted to bail, during the pendency of said appeal or further appeals, and not to serve said sentence herein or any portion thereof during the pendency of such appeal or appeals, it is hereby

Ordered that any time spent by the defendant during the pendency of said appeal or further appeals in the King County Jail or any Assembly Center of other institution shall not constitute the serving of the sentence herein nor be considered as applying upon the terms of said sentence, and the execution of the sentence and commitment thereunder is hereby stayed during the pendency of such appeal or appeals.

Dated at Seattle, Washington, this 26th day of October, 1942.

Lloyd L. Black, United States District Judge.

[fol. 49] Presented by: Frank L. Walters, Attorney for the Defendant.

Requested and Approved: Gordon Kiyoshi Hirabayashi, Defendant.

Copy of foregoing received.

J. Charles Dennis, U. S. District Attorney.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN FORMA PAUPERIS—Filed Oct. 23, 1942

UNITED STATES OF AMERICA,
Western District of Washington
State of Washington
County of King, ss:

Gordon Kiyoshi Hirabayashi, being first duly sworn, on his oath deposes and says: That he is an adult male, of the age of twenty-four years, a citizen of the United States of America by birth, and the party defendant above named and the appellant herein; that he neither owns or possesses any real property or any interest therein, and is the owner and possessed of personal property only, the reasonable value of which amount to not to exceed the sum of Fifty $50 Dollars, and consists of certain articles of wearing apparel and clothing, and articles of adornment, and the approximate sum of $5.00 in cash; that because of his poverty he is unable to pay the costs of this action and the costs of the appeal from the finding of guilty and order sentencing him to a term of three months on each count of the indictment in the Federal Prison Camp at Dupont, Washington, nor is he able to give security therefor; that he sincerely believes he is entitled to the redress he seeks in said appeal from said judgment of the trial court to the Circuit Court of Appeals for the Ninth Circuit; that the nature of his appeal is that said judgment of the trial court should be reversed for the reasons that the statute, Public Law No. 503 of the 77th Congress, Second Session, under which he was found guilty and received said sentence, is void for [fol. 51] *for* uncertainty and is also void and unconstitutional in that said statute and the military orders upon which the statute is based violate defendant's constitutional rights*k* privileges and immunities safeguarded and guaranteed by the Constitution of the United States, particularly by the 4th, 5th, 6th, 8th, 9th, 10th and 14th amendments thereto and that the defendant has herein been deprived of his rights, liberties, privileges and immunities without due process of law; that by reason of his poverty as aforesaid defendant is unable to pay the expenses of the preparation and certification of the record on appeal nor of having his briefs on appeal printed.

Wherefore, defendant prays for an order of the Court waiving the costs and expenses aforesaid and directing that the costs of said appeal and the expense of preparing and certifying and printing the record on appeal herein be paid by the United States of America and that the same be paid when authorized by the Attorney General as provided in 28 U. S. C. A. 832.

Dated: October 23, 1942.

Gordon Kiyoshi Hirabayashi, Affiant (Defendant and Appellant).

[fol. 52] Subscribed and sworn to before me this 23rd day of October, 1942. Frank L. Walters, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

Received a copy of the within Affidavit, IFP this 23 day of Oct. 1942.

J. Charles Dennis, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

ORDER DISPENSING WITH PAYMENT OF FEES AND COSTS OF PRINTING RECORD ON APPEAL—Filed Oct. 23, 1942

Upon reading and filing of the affidavit in forma pauperis of the defendant herein, Gordon Kiyoshi Hirabayashi, appellant in the above entitled cause,

It is hereby ordered that the said defendant-appellant may, without being required to prepay the fees, costs and expenses for the printing of the record on appeal, prosecute and defend to conclusion in forma pauperis his appeal to the appellate Court or Courts from the judgment herein, and it is

Further ordered and directed that the expense of printing the record on appeal herein be paid by the United States of America, and that the same be paid when author-

ized by the —. Dated at Seattle, County of King, State of Washington, this 23rd day of October, 1942.

Lloyd L. Black, United States District Judge.

Presented by Frank L. Walters, Attorney for Defendant.

Received copy of the within Order this 23 day of Oct. 1942.

J. Charles Dennis, Attorney for Plaintiff.

Notice of presentment waived. J. Charles Dennis, U. S. Attorney.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS

This cause came on regularly for trial on October 20, 1942 before the Honorable Lloyd L. Black, Judge of the above entitled Court, and a jury, and during the trial the following proceedings were had and testimony given and evidence offered and admitted or refused:

TESTIMONY OF SHUNTO HIRABAYASHI

After the jury had been selected and sworn, Shunto Hirabayashi was duly sworn as a witness on behalf of the plaintiff, but before any testimony was given, the defendant, by his counsel, moved the Court to quash or suppress all evidence in the action and to dismiss the indictment and discharge the defendant on the grounds that the indictment failed to state facts sufficient to constitute any crime or offense, and that the defendant had been deprived of liberty and property without due process of law, and that Executive Order No. 9066, the Proclamations 2 and 3, and Civilian Exclusion Order #57 of the Military Commander, and Public Law #503, are all unconstitutional and void. The motion was by the trial Court denied to which the defendant excepted and his exception allowed.

Said Gordon Hirabayashi t-en testified that he was born in Japan as was his wife, Mitsu Hirabayashi; that they are

the father and mother respectively of the defendant here; on cross-examination, he testified that he and his wife were converted to the Christian religion before coming to the United States; that witness came to the United States in 1909 and his wife in 1914; that neither of them have ever been back to Japan, and neither he nor his wife have since had any connection with the Empire of Japan since coming to this country.

[fol. 55] TESTIMONY OF TOM G. RATHBONE

Witness Tom G. Rathbone was then sworn and testified that the defendant did not report at the Civil Control Station located at Christian Youth Center, 2203 East Madison Street, Seattle, Washington, on Monday, May 11, 1942, nor did he report at said Civil Control Station on May 12, 1942. That on May 16, 1942, he voluntarily came to the office of the U. S. Employment Service, of which the witness was an officer, in the company of Special Agent H. H. McKee of the Federal Bureau of Investigation; that defendant admitted he knew of the evacuation orders and regulations to report to the Civil Control Station, but had not reported there on either May 11, or May 12, 1942, to register for evacuation because he, defendant, believed the evacuation orders and regulations were unconstitutional and deprived him, as a native born American citizen of his rights under the Constitution, and he could not, therefore, in good conscience, obey the orders and waive his rights as an American citizen; that defendant was told that if he did not then register for evacuation, charges would have to be preferred against him, and defendant again said he could not, believing as he did that his rights as an American citizen were being or would be violated if he obeyed the orders, register and submit to the unlawful evacuation orders.

TESTIMONY OF H. H. MCKEE

H. H. McKee, Special Agent of the F. B. I. was then sworn as a witness for the plaintiff and testified that defendant came to the office of the Federal Bureau of Investigation at Seattle, on May 16th, 1942, and voluntarily went with the witness to the office of witness Rathbone, and witness McKee's testimony corroborated that of witness Rathbone above delineated; that defendant was honest and [fol. 56] above board in the matter and had told the wit-

ness when defendant had voluntarily come to the F. B. I. office that defendant could not voluntarily obey the evacuation orders because he believed them unlawful and that they deprived him of his rights under the Constitution as an American citizen.

Testimony of Floyd Schmoe

Floyd Schmoe, sworn as a witness for the plaintiff, testified that during the month of May 1942 the residence of defendant was Eagleson Hall, 1417 East 42nd Street, Seattle, Washington. That on the evening of May 9, 1942 defendant left his residence after eight o'clock p. m. and did not return to said residence until after six o'clock on the morning of May 10, 1942; that defendant had said he had not obeyed the curfew regulations because he believed they were unconstitutional and to obey them would be a waiving of his rights as an American citizen under the Constitution. Ralph Seaton corroborated the testimony of witness Schmoe.

Testimony of Captain Michael Revisto

Captain Michael Revisto, officer of the U. S. Army in Charge of Japanese evacuation in Seattle under Lt. Genl. J. L. DeWitt, was sworn as a witness for the plaintiff and testified to having a conversation of some length with the defendant, trying to persuade the defendant to change his mind and voluntarily submit to the evacuation orders and avoid criminal litigation over his refusal, but that again and again defendant told the witness that defendant had been raised by his parents and taught during his education that he, as an American citizen, born in the United States, had the same rights and liberties as all other American citizens have, and that to voluntarily obey the evacuation orders would be a waiving of those rights, which he could not conscientiously do.

Testimony of Arthur G. Barnett

Arthur G. Barnett was sworn and testified for the plaintiff that he had counseled with defendant as his friend, and defendant had told him defendant could not, feeling as he [fol. 57] did about his constitutional rights as an American citizen, voluntarily obey the evacuation orders.

Plaintiff rested.

Motion for Directed Verdict and Denial Thereto

Defendant here challenged the sufficiency of the evidence to prove either of the offenses charged, and moved the court to dismiss the action and discharge the defendant. The motion was denied, defendant excepted and his exception was allowed.

Testimony of Gordon Kiyoshi Hirabayashi

Defendant was sworn as a witness in his own behalf and testified that he was born in Seattle, King County, State of Washington April 23, 1918; that he was educated in the public schools of King County and Seattle and was a senior at the University of Washington, at the time of his incarceration in the county jail in May, 1942, majoring in mathematics; that he has never been to Japan nor had any connection of any kind with the Japanese living in Japan; that his parents had always taught him and his brothers and sisters that they are American citizens and how to conduct themselves as such; that he has been active in the Boy Scout movement, having been a life scout in a troop of Japanese boys and assistant scout master, and was active in and at one time vice-president of the Y. M. C. A. at the University of Washington, and had attended student Y. M. C. A. conferences in other states as the representative of the University Y. M. C. A.; that in those organizations and in the schools and university he had learned what is expected of good American citizens, and what his rights are as such an American citizen, and he had at all times tried earnestly to conduct himself as one; that he had never before been arrested on any charge whatever; that he had not reported to the Civil Control Center nor remained in his residence during the curfew hours because he honestly believed that the evacuation and curfew orders were and are [fol. 58] unconstitutional and violated his rights as an American citizen, and that for him to voluntarily obey them would be a waiver of his rights, that believing as he did and does his conscience would not let him voluntarily submit to orders which he believed unlawful, especially since he believed that the orders discriminated against him and other American citizens of Japanese ancestry on the basis of race and color, which he had been taught to believe is against one of the fundamental principles upon which our government is founded; that he believed it to be his right

and duty as an American citizen to defend his action in order that he might have the constitutional questions involved properly raised and determined in a court of law.

Testimony of M. D. Woodbury

M. D. Woodbury was sworn as a witness on behalf of the defendant, and testified that he had known defendant during the past two to three years while the witness was the Secretary-manager of the University of Y. M. C. A. and while defendant roomed in the dormitory of that Y. M. C. A.; that defendant at all times had conducted himself as a law abiding American citizen, was a leader in the Y. M. C. A. and other student organizations and affairs, and was well respected among his fellow students and the staff of the Y. M. C. A., and bore a very fine reputation among the people of the community.

Defendant offered in evidence Deft's Exhibit A-1; objection of the plaintiff to its admission was sustained; defendant excepted, and his exception was allowed.

Defendant rested. Plaintiff rested.

[fol. 59] Motion for Directed Verdict and Denial Thereof

Defendant again challenged the sufficiency of the evidence to prove the commission of either offence in the indictment, that the indictment did not state facts sufficient to constitute any crime charged, and moved the Court to dismiss the action or direct a verdict of not guilty and discharge the defendant. The motion was over-ruled and denied, to which defendant duly excepted and his exception was allowed.

After argument of counsel the Court instructed the jury and the jury retired to consider its verdict.

Defendant, through his counsel, then took exceptions to the refusal of the Court to give Defendant's requested instructions, and further excepted to the instructions given by the court on the grounds that they were against the law and the evidence, that they amounted in effect to instruction to the jury to bring in a verdict of guilty on both counts, which it was improper for the court to do, and on the further grounds that the instructions or the law were erroneous because of all the grounds raised on defendant's amended demurrer to the indictment and that the court

erred in taking judicial notice of Executive Order #9066, Public Proclamations 2 and 3 and Civilian Exclusion Order #57 of the Military Commander as they were unconstitutional and void, and that Public Law #503 under which the action was prosecuted was not a valid criminal statute.

After the return of the verdict of guilty on both counts the defendant, on November 21, 1942 moved the court for a [fol. 60] new trial, on the grounds stated therein; that motion was denied by the court, defendant excepted to the Court's ruling, and his exception was allowed.

The Court then adjudged the defendant guilty of each offense charged in the two counts of the indictment.

Defendant then moved the Court in arrest of judgment and sentence on the grounds that the defendant had not been granted a fair trial and his constitutional rights had been violated. The motion was denied and the defendant excepted to the Court's ruling and his exception was allowed.

The Court then announced orally the sentence of the Court and the same was committed to writing and signed by the Court.

Defendant took exception to the imposition of any sentence on him.

[fols. 61-62] JUDGE'S CERTIFICATE

UNITED STATES OF AMERICA,
State of Washington,
County of King, ss:

I. Lloyd L. Black, Judge of the District Court of the United States for the Western District of Washington, Northern Division, and the Judge before whom the foregoing cause entitled, "United States of America, plaintiff, vs. Gordon Kiyoshi Hirabayashi, defendant," was heard and tried with a jury, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the said cause and attached to the Bill of Exceptions contains all of the material facts, matters and proceedings heretofore occurring in said cause not already a part of the record therein; and I further certify that the said Bill of Exceptions, together with the exhibits admitted and the exhibits offered and refused, and on file herein in said cause and attached to the Bill of Exceptions contains all of the

material facts, matters and proceedings heretofore occurring in said cause not already a part of the record therein; and said Bill of Exceptions and the exhibits attached thereto are made a part of the record in said cause, the Clerk of the Court being hereby instructed to attach all exhibits admitted and offered and refused admission, thereto.

Counsel for the respective parties being present and concurring herein I have this day signed this Bill of Exceptions.

In witness whereof, I have hereunto set my hand on this 2nd day of November, 1942.

Lloyd L. Black, Judge of the District Court of the United States.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 2, 1942

Comes now the defendant, by Frank L. Walters, his attorney herein, and for the purpose of assigning the errors which he claims the Court committed in this cause and proceeding and the trial thereof, hereby makes the following Assignment of Errors, to-wit:

1. That the Court erred in overruling the amended demurrer of the defendant to the indictment and each count thereof.

2. The Court erred in denying the defendant's plea in abatement of the indictment.

3. The Court erred in entering herein an order overruling said amended demurrer to and denying defendant's plea in abatement of the indictment.

4. The Court erred in refusing to sustain defendant's motion made at the opening of the trial and before any testimony or evidence was admitted, to dismiss the action on the grounds stated in the motion, and in denying said motion, to suppress all evidence in the case.

5. The Court erred in refusing to sustain defendant's challenge to the sufficiency of the evidence made the con-

clusion of the plaintiff's case and in refusing to grant defendant's motion made at the same time, to dismiss the [fol. 64] action and discharge the defendant as neighter offense charged in the indictment had been proven, and to direct a verdict of acquittal.

6. The Court erred in denying defendant's motion for a directed verdict of acquittal made the conclusion of the trial after both parties had rested.

7. The Court erred in denying defendant's motion in arrest of judgment and sentence made after defendant had been adjudged guilty.

8. The Court erred in refusing to give defendant's requested or proposed instructions to the jury.

9. The Court erred in refusing to admit in evidence Deft's Exhibit A-1 which defendant offered in evidence.

10. The Court erred in entering judgment and sentence against the defendant.

S/N Frank L. Walters, Attorney for the Defendant.

Endorsed:
Received a copy of the within Assignment of Error this 31 day of Oct. 1942, J. Charles Dennis, Atty. for pltf.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD ON APPEAL—Filed October 28, 1942

To the Clerk of the above entitled Court:

Please prepare a Record on Appeal for the appeal of the above entitled cause and the judgment and sentence therein to the Circuit Court of Appeal of the United States for the Ninth Circuit, and for that purpose please prepare the following:

1. May 28, 1942 Indictment.
2. June 1, 1942 Arraignment and Plea of not guilty.
3. June 1, 1942 Entry—Order allowing motion and demurrer to be filed within ten days.

4. June 11, 1942 Order of appearance of Frank L. Walters, for Defendant.

5. June 22, 1942 Entry—Order allowing defendant to file within one week a motion to make more definite and certain and amended demurrer to indictment.

6. June 29, 1942 Amended Demurrer and Plea in Abatement.

7. Sept. 15, 1942 Memorandum Opinion of the Court.

8. Sept. 24, 1942 Order denying plea in abatement and overruling amended Demurrer.

9. Oct. 17, 1942 Supplement to Memo Opinion.

10. Oct. 20, 1942 Verdict of the Jury.

11. Oct. 20, 1942 Requested Instruction of Defendant.

12. Oct. 21, 1942 Motion for New Trial.

13. Oct. 21, 1942 Entry—Motion for New trial denied.

[fol. 66] 14. Oct. 21, 1942 Judgment and Sentence.

15. Oct. 23, 1942 Notice of Appeal.

16. Oct. 23, 1942 Affidavit in forma pauperis.

17. Oct. 23, 1942 Order dispensing with payment of costs, etc., on appeal.

18. Oct. 26, 1942 Order re time spent in jail and staying execution.

19. Nov. 2, 1942 Bill of Exceptions.

20. Nov. 2, 1942 Assignment of Errors.

Frank L. Walters, Attorney for the Defendant.

[File endorsement omitted.]

[fols. 67-68] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 69] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10308

GORDON KIYOSHI HIRABAYASHI, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLANT'S STATEMENT OF POINTS—Filed Nov. 25, 1942

[fol. 70] Appellant relies upon the following points and the authorities cited:

1. That Executive Order #9066, as applied by Public Proclamations 1, 2 and 3 and Civilian Exclusion Order #57 of the Military Commander to American citizens, is unconstitutional and void as attempted legislation not authorized by the Congress in the Alien Enemy Act (Title 50, secs. 21-24, U. S. C. A.)

Art. 1, sec. 1 and sec. 8, cls. 1, 14 and 15, Constitution;
Muir v. Louisville & N. R. Co., 277 Fed. 888;
Schechter Poultry Co. v. U. S., 295 US 495; 97 L. ed. 1570;
U. S. v. Wong Kim Ark, 169 US 649; 42 L. ed. 890.

2. That Public Proclamations 1, 2 and 3 and Civilian Exclusion Order #57 of the Military Commander, on their faces and as applied to American citizens, are unconstitutional and void as exceeding the powers delegated either by the Alien Enemy Act or Executive Order #9066.

Art. 1, sec. 1, and sec. 8, cls. 1, 14 and 15, Constitution;
Field v. Clark, 143 US. 649;
Panama Refining Co. v. Ryan, 293 US. 388;
Schechter Poultry Co. v. U. S., supra.

3. That said Public Proclamations and Exclusion Order are unconstitutional and void in creating military areas or zones and defining crimes when martial law has not been declared and does not exist in Washington.

Bishop v. Vandercook, 228 Mich. 299; 200 N. W. 278;
Ex parte Gilroy, 257 Fed. 110;
Ex parte Milligan, 4 Wall (US) 2; 18 L. ed. 27;
Ex parte Quirin, U. S. Supreme Court, October 29, 1942;
Hamilton v. Kentucky Distillery, 40 US. 108;
Home Bldg. & Ln. Asstn. v. Blaisdell, 290 US. 398;
Sterling v. Constentin, 287 U. S. 387, 77 L. ed. 375;
U. S. v. L. Cohen Grocery Co., 255 US. 81, 65 L. ed. 516;
U. S. v. Yasui, supra.

[fol. 71] 4. That said executive order and public proclamations and exclusion order, on their faces and in their application to appellant and all other American citizens, are unconstitutional and void, because they deny appellant and all other American citizens "due process of law" and "equal protection of the laws".

Fifth Amendment to the Constitution;
Sixth Amendment to the Constitution;
Felts v. Murphy, 201 US. 123, 50 L. ed. 689;
Ong Chang Wing v. U. S., 218 US. 272, 54 L. ed. 1040;
Truax v. Corrigan, 257 US. 312, 66 L. ed. 254;
U. S. v. Yasui, supra.

5. That said executive order, proclamations and exclusion order are on their faces and as applied to appellant and other American citizens of Japanese ancestry, unconstitutional and void as class legislation in that they:

(a) Class American citizens as and with Alien Enemies.

Brown v. U. S., 8 Cranch. 110;
Ex parte Milligan, supra;
Sims v. Rives, 84 Fed. (2) 871; cert. denied 298 US 682.

(b) Create a discrimination based upon Race or Color.

American Sugar Refg. Co. v. Louisiana, 179 US. 89, 45 L. ed. 102;
Buchanan v. Warley, 245 US. 60, 62 L. ed. 149;
City of Richmond v. Deans, (CCA) 37 Fed. (2) 712;
Harmon v. Tyler, 273 US. 668, 71 L. ed. 831;
Irvine v. City of Clifton Forge, (va) 97 S. E. 310;

Yick Wo v. Hopkins, 118 US. 356; 30 L. ed. 220;
Yu Cong Eng v. Trinidad, 271 US. 500, 70 L. ed. 1059.

6. That Public Law #503, 77th Cong. 2nd Sess., c. 191, by its application through the military exclusion order, is unconstitution- and void upon the following grounds:

(a). It is a Bill of Attainder.

Art. I, sec. 9, cl. 3 of the Constitution;
11 A. J. 1175.

(b). It attempts to create a Title of Nobility.

[fol. 72] Art. 1, sec. 9, cl. 7.

(c). It creates involuntary servitude.

Thirteenth Amendment to the Constitution.

(d). By classifying American citizens with Alien enemies it convicts American citizens of treason or an intent to commit treason against the United States of America.

Art. III, sec. 3, of the Constitution.
Ex parte Bollman, 4 Cranch 75, 2 US (L. ed) 554.

(e). By exclusion and internment of American citizens without the issuance of a warrant according to law, constitutes an Unreasonable Seizure of the person of the American citizen, and this appellant.

Fourth Amendment of the Constitution;
Boyd v. U. S., 116 US. 616, 29 L. ed. 746;
Newberry v. Carpenter, (Mich) 65 N. W. 630; 61 A. S. R. 346;
Stantenbaugh v. Frazier, 16 App. Cas. (D. C.) 229, 48 LRS. 220;
Weeks v. U. S., 232 US. 383, 58 L. ed. 652;
24 R. C. L. 707, sec. 9.

7. Public Law #503, 77th Cong. 2nd sess., is unconstitutional and void on its face for the following reasons:

(a) It is too indefinite and uncertain to constitute a valid criminal statute.

Connally v. General Const. Co., 269 US. 385, 70 L. ed. 322;
Ex parte Rocquemore, (Tex) 131 S. W. 1101; 32 LRS (NS) 1186;

U. S. L. Cohen Grocery Co., 255 US 81, 65 L. ed. 516;
U. S. v. Brewer, 139 US. 278, 35 L. ed. 190.

(b). It attempts to delegate to the courts and juries the power to define a crime.

Art. I, sec. 1, of the Constitution;
U. S. v. L. Cohen Grocery Co., supra.

[fols. 73-91] 8. The application of the military proclamations and exclusion order and Public Law #503 have deprived the appellant and all other American citizens of his race of those fundamental rights, privileges and immunities, guaranteed by the Constitution, which are "so vital to the maintenance of democratic institutions" (Schneider v. Irvington, 308 US. 147), which are the "immutable principels of justice which inhere in the very idea of free government" (Holden v. Hardy, 169 US. 366) and which are the fundamental rights which belong to every citizen as a member of society" (U. S. v. Cruikshank, 92 US. 542), and are those "certain inalienable Rights" with which "all men ——— are endowed by their Creator" and among them are "Life, Liberty and the Pursuit of Happiness" (The Declaration of Independence).

Frank L. Walters, Attorney for the Appellant.

[fol. 92] Supreme Court of the United States

[Title omitied]

No. 870 October Term 1942

Order Directing that Entire Record Be Certified—April 5, 1943

In accordance with section 239 of the Judicial Code (28 U. S. C., section 346), it is ordered that the entire record in this case be certified up to this Court so that the whole matter in controversy may be considered by the Court.